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*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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MAY 24 2012

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Appellee,	)	2 CA-CR 2011-0056
	)	DEPARTMENT A
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
DONNY ALLEN HALES,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20101414001

Honorable Christopher C. Browning, Judge

AFFIRMED

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and Alan L. Amann

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E C K E R S T R O M, Presiding Judge.

¶1 Appellant Donny Hales was convicted after a jury trial of kidnapping, aggravated assault with a deadly weapon, disorderly conduct, and unlawful discharge of a firearm in city limits. He was sentenced to concurrent prison terms, the longest of which

is 15.75 years for kidnapping. He argues the trial court abused its discretion in denying his request for a *Willits* instruction,<sup>1</sup> that the state presented insufficient evidence to support the kidnapping and aggravated assault charges, and that the jury's finding he was on parole was fundamental error. For the following reasons, we affirm his convictions and sentences.

### **Factual and Procedural Background**

¶2 Hales was charged with one count each of attempted second-degree murder, disorderly conduct, discharging a gun in city limits, aggravated assault, kidnapping, and one count of prohibited possession of a firearm. According to Hales, “[a]ll charges arose from one incident outside a . . . restaurant in which [Hales], in a desperate attempt to reunite with his estranged girlfriend [C.], held a gun to his head, fired it in the air, and physically pulled and shoved [C.] into his truck in an attempt to talk her into coming back to him.” However, there was also evidence presented that, during the incident, Hales grabbed C.’s hair; dragged her outside; hit her repeatedly; and pointed the gun at her, saying he would kill her.

¶3 The prohibited possessor count was severed from the rest of the counts, and Hales pleaded guilty to that charge. He also stipulated that he had two historical prior felony convictions. The jury found Hales not guilty of attempted second-degree murder but guilty of the remaining charges. It also found beyond a reasonable doubt that he was

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<sup>1</sup>*State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

on parole at the time he committed the offenses. He was sentenced as described above, and this timely appeal followed.

### ***Willits* Instruction**

¶4 Hales argues the trial court erred when it denied his request for a *Willits* instruction. We review the denial of such an instruction for an abuse of discretion. *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995). Hales requested a *Willits* instruction based on an alleged surveillance videotape of the restaurant from the night of the incident. While discussing proposed instructions with the court before trial, Hales acknowledged he would need “to show [a] little more foundation on that to see that the State—that the police officer ever tried to get the video, did they not try to get the video.” The state responded, “[T]his video did not exist. Not something that we have had.” But the court gave Hales leave to ask the investigating detective about the video.

¶5 After the second day of trial, Hales had the following exchange with the court about the instruction:

[HALES]: My understanding [is] they tried to get the surveillance tape. For some reason [the restaurant] didn’t give it to the officers or something. . . . I may ask Detective Hearn that tomorrow.

. . . .

[STATE]: Detective tried to get it. [The restaurant] said we don’t think one exists. We will give it to you if we end up finding one. At some point they never gave that. . . .

THE COURT: Not entitled to Will[i]ts instruction if it never existed. Got to have existed, been lost or destroyed or kept or altered it. And we’ll wait on that tomorrow.

. . . .

[STATE]: One way or other, [it was] never in possession at any time of the State. I think the Will[i]ts instruction require[s] that one way or the other.

The court did not expressly deny the motion at that time, but rather indicated that it would revisit the issue once the detective could be asked about the existence of the video.

¶6 Tucson Police detective Christina Hearn testified that she responded to the restaurant on the night of the incident. When asked if there was a “video of the outside so we could see what actually happened,” Hearn responded, “[F]rom what I can remember the manager, there was difficulty, has the video and the case detective was going to follow up with that.” Hearn then stated that she did not know if the other detective had followed up or if a video actually existed. On redirect, the state asked Hearn about the video again. She clarified that she had “inquired about it,” but she “[n]ever actually s[aw] that there was a video.” It appears from our record that the parties and the court never revisited the issue, and the court did not give a *Willits* instruction.

¶7 “A *Willits* instruction permits the jury to draw an inference against the state if the state permits evidence within its control to be destroyed.” *State v. Broughton*, 156 Ariz. 394, 399, 752 P.2d 483, 488 (1988). To be entitled to such an instruction, the defendant must show the state “failed to preserve material and reasonably accessible evidence that had a tendency to exonerate the accused” and that he suffered prejudice from the loss of the evidence. *State v. Reffitt*, 145 Ariz. 452, 461, 702 P.2d 681, 690 (1985). If a defendant is entitled to such an instruction, the jury is informed that if “the

state has lost, destroyed or failed to preserve material evidence that *might* aid the defendant and [the jury] find[s] the explanation for the loss inadequate, [it] may draw an inference that that evidence would have been unfavorable to the state.” *State v. Youngblood*, 173 Ariz. 502, 506, 844 P.2d 1152, 1156 (1993); *accord State v. Willits*, 96 Ariz. 184, 187, 191, 393 P.2d 274, 276, 279 (1964).

¶8 It is unclear from our record whether a videotape actually existed. The trial court made no findings about the existence of the tape nor stated the reasons for its denial of Hales’s request. However, we must affirm the denial of the instruction on any legally correct ground found in the record. *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984). And, Hales has not shown that even if the videotape existed, that it would have had a “tendency to exonerate” him. *Reffitt*, 145 Ariz. at 461, 702 P.2d at 690. He simply argues it would have been the most objective evidence of the incident. But based on the evidence that was presented at trial, it is at least as likely the videotape would have inculpated rather than exculpated him. *Cf. Perez*, 141 Ariz. at 464, 687 P.2d at 1219 (upholding denial of *Willits* instruction when no evidence suggested missing surveillance video would have supported defense). Accordingly, his claim that the videotape would be exculpatory is mere speculation. *See State v. Smith*, 158 Ariz. 222, 227, 762 P.2d 509, 514 (1988) (no abuse of discretion in denying *Willits* instruction when “nothing except speculation” suggested lost evidence exculpatory); *State v. Dunlap*, 187 Ariz. 441, 464, 930 P.2d 518, 541 (App. 1996) (same); *see also State v. Davis*, 205 Ariz. 174, ¶ 37, 68 P.3d 127, 133 (App. 2002) (exculpatory value of evidence must be “apparent” under *Willits*). We find no abuse of discretion.

## Sufficiency of the Evidence

¶9 Hales argues there was insufficient evidence to support the kidnapping charge because there was no evidence he had the requisite intent. He also argues his aggravated assault conviction is unsupported by sufficient evidence because the state failed to show C. was placed in reasonable apprehension of imminent bodily harm. Hales moved for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., on both charges. The trial court denied his motion as to both charges on the ground the evidence Hales threatened C. with a gun was sufficient to show the requisite intent for kidnapping and he had placed her in fear of harm.

¶10 A trial court must enter a judgment of acquittal of an offense when “there is no substantial evidence to warrant a conviction.” Ariz. R. Crim. P. 20(a). When reviewing the denial of a Rule 20 motion, we view the evidence in the light most favorable to sustaining the verdict. *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987). But the sufficiency of the evidence is a question of law we review de novo. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011).

¶11 On a Rule 20 motion, “‘the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990), *quoting Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *accord West*, 226 Ariz. 559, ¶ 16, 250 P.3d at 1191. “‘Substantial evidence,’ Rule 20’s lynchpin phrase, ‘is such proof that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant’s guilt beyond a

reasonable doubt.”” *West*, 226 Ariz. 559, ¶ 16, 250 P.3d at 1191, *quoting Mathers*, 165 Ariz. at 67, 796 P.2d at 869.

¶12 C. testified that she had been in a romantic relationship with Hales from August 2009 until March 2010. They had ended the relationship about a week before they decided to meet at the restaurant on March 22, 2010. She arrived first and was inside the restaurant talking to her friend. She saw Hales drive up in his truck and she waved to him to come inside. When he was at the door of the restaurant, she stated that “[h]e held the gun to his head and I kind of got the gesture that well, if [I] d[id]n’t come outside, you know, . . . that he was going to shoot himself.” She had started to go out the door when she heard a gunshot, so she ran back inside the restaurant toward the bathroom. Hales came in behind her, “grabbed” her, and they went outside to his truck. She resisted his efforts to get her into the truck.

¶13 C. testified at trial that Hales had not pointed the gun at her at any time during the incident. But, during her interview with detective Hearn on the night of the incident, C. stated at least three times that Hales had pointed the gun at her at the door of the restaurant. She also stated he was repeatedly hitting her to try and get her into the truck. When she had the chance to escape from the truck, she was “scared,” so she ran back into the restaurant. At trial, C. recanted most of these allegations, stating she loved Hales and wanted to marry him.

¶14 C.’s friend, M., testified she was working at the restaurant on March 22. She saw Hales at the door of the restaurant with the gun pointed to his head. Then she heard the gunshot and saw C. run toward the bathroom. She saw Hales run toward the

bathroom and grab C. by the hair. According to M., he had the gun pointed at C.'s side as he took C. outside.

¶15 C. B. was in a parking lot across from the restaurant on the night of the incident, about one hundred yards away. He heard the sound of a gunshot, a man's voice yelling, and a woman's voice screaming. He heard the man telling the woman to get in the car. Then he saw the man tackling her, taking her to the ground, and then forcing her into the truck while she resisted.

¶16 A. was also working at the restaurant on March 22. She testified that "C[.] ran in and was screaming and [Hales] was chasing her." A. saw a gun in Hales's hand, and he was forcing C. out of the building with him. She saw Hales get C. into the truck despite C.'s resistance. A. testified that eventually, C. got out of the truck and ran back inside. Her demeanor was "scared. She was crying. She was shaking."

¶17 C. O., the manager on duty at the restaurant on the night of the incident, testified that she first heard a woman's voice saying a man had a gun. She saw C. running toward the bathroom, and Hales was running after her. C. O. saw Hales "dragging [C.] by the hair" out the door and into the parking lot toward his truck. C. O. followed them out to the truck and she saw him with a gun in his hand. When they were outside the truck, C. O. testified she saw Hales point the gun at C.'s head and state he was going to kill her. When C. ran back inside the restaurant, Hales, having been warned the police were on their way, drove away in his truck.

¶18 A person commits kidnapping by knowingly restraining another person with the intent to inflict physical injury, otherwise aid in the commission of a felony, or

place the other person in reasonable apprehension of imminent physical injury. A.R.S. § 13-1304(A)(3), (4). Hales contends kidnapping was not proven by sufficient evidence because the only evidence of his intent in restraining C. was that he wanted to talk to her. But we agree that Hales's intent to commit an aggravated assault on C., or to place her in reasonable apprehension of imminent physical harm, could be inferred from his actions that night, including the testimony that he pointed a gun at her and threatened to kill her. Nor was the jury required to accept his explanation for forcing C. into the truck when deciding if the state had proven the requisite intent. *See State v. Cañez*, 202 Ariz. 133, ¶ 39, 42 P.3d 564, 580 (2002) (credibility of witnesses jury question); *State v. Sullivan*, 205 Ariz. 285, ¶ 6, 69 P.3d 1006, 1008 (App. 2003) (no error to deny Rule 20 motion when "reasonable minds could differ on the inferences to be drawn from the evidence").

¶19 He further argues that, because the jury must have convicted him of aggravated assault based on his pointing the gun at C. before restraining her, his conviction for kidnapping based on his intent to commit an aggravated assault is not supported by sufficient evidence. But the state also presented evidence that Hales pointed the gun at C. after he had restrained her. He acknowledges C. O. testified that he pointed the gun at C.'s head and threatened to shoot her, but Hales contends this testimony has no weight because C. O. "did not testify that [C.] actually felt threatened or was even aware of any threat." However, there was other evidence from which the jury could have concluded that C. had felt threatened after she was restrained by Hales. M. testified Hales held the gun at C.'s side while he took her out to the truck. C. testified she ran back into the restaurant from the truck rather than walked because she had been

scared of “what would happen” and because Hales possessed a gun. A. testified that, when C. had come inside from the truck, she seemed scared and was crying and shaking. A reasonable jury could have inferred from this evidence that Hales restrained C. with the intent to place her in fear of imminent physical harm. The court did not err in denying Hales’s Rule 20 motion on the kidnapping count.

¶20 Aggravated assault is committed when a person uses a deadly weapon to intentionally put another person “in reasonable apprehension of imminent physical injury.” A.R.S. §§ 13-1203(A)(2), 13-1204(A)(2).<sup>2</sup> Without addressing the evidence that he had pointed the gun at C. at other times during the incident, Hales challenges the aggravated assault conviction on the ground the only evidence C. “felt threatened” by Hales was C. O.’s uncorroborated testimony that he had pointed the gun at C.’s head and threatened to shoot her when they were near the truck.

¶21 Hales relies on *State v. Baldenegro*, 188 Ariz. 10, 12, 16, 932 P.2d 275, 277, 281 (App. 1996), to support his argument, a case in which this court reversed an aggravated assault conviction. In that case, we “reject[ed] the state’s contention that [the victim]’s mere presence in a car at which someone fired shots is sufficient circumstantial evidence of his apprehension or fear” when there was no evidence the victim saw the gun pointed at him before the shooting or that he reacted to avoid the shooting, like the other victims had done. *Id.* at 13-14, 932 P.2d at 278-79. But there was evidence presented in this case that C., unlike the victim in *Baldenegro*, was aware Hales had pointed the gun at

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<sup>2</sup>Because the aggravated assault statute has not changed, in relevant part, since the date of the offense, we cite the current version of § 13-1204.

her, and she reacted fearfully by running away from Hales. The state presented sufficient evidence from which a reasonable jury could have found the elements of aggravated assault proven beyond a reasonable doubt.

¶22 We find no error in the denial of Hales’s Rule 20 motions on the kidnapping and aggravated assault charges.

### **Parole Determination**

¶23 Hales finally argues the jury’s determination he was on parole in March 2010 was “an impossibility as a matter of law.” He concedes that he did not raise the issue below, and that therefore, we review it solely for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005) (when alleged error not objected to in trial court, appellate court reviews issue only for fundamental error and resulting prejudice).

¶24 The state alleged, pursuant to A.R.S. § 13-708,<sup>3</sup> that Hales had committed dangerous offenses while “on probation, parole, work furlough or any other release in Maricopa County Superior Court, cause numbers CR97-07022 and CR97-04321.” After the jury verdicts, a further hearing was held on the state’s allegation. Gregory Smith, a “community supervision officer” with the Arizona Department of Corrections (ADOC) “parole department,” testified that he had supervised Hales on parole since July 2009, and that Hales was on parole on March 22, 2010, for a felony offense. The jury found that Hales had committed the instant offenses while “on parole,” and as a result, Hales was

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<sup>3</sup>We cite the version of the law in effect at the time Hales committed the present offenses. *See* 2009 Ariz. Sess. Laws, ch. 82, § 5.

not eligible for less than presumptive sentences for his dangerous offenses. *See* § 13-708(A).

¶25 Hales contends he could not have been on parole for offenses he had committed in 1996 because a change in the sentencing code in 1993 “eliminat[ed] the possibility of parole from the Arizona sentencing code beginning with crimes committed on or after January 1, 1994.” Hales acknowledges it was “at least a viable possibility” he was on community supervision in March 2010, another release condition encompassed by § 13-708, but contends this “does not salvage” the jury’s erroneous finding he was on parole because there was no evidence presented that he was on community supervision on that date.

¶26 The state concedes Hales technically could not have been on parole in March 2010 based on the statutory change. However, it points to the evidence of community supervision in the record, and argues Hales has not shown prejudice because if he had objected timely, it could have proven specifically that he was on community supervision rather than parole. *See State v. Miller*, 215 Ariz. 40, ¶¶ 10-13, 156 P.3d 1145, 1148-49 (App. 2007) (finding no prejudice from jury’s determination of prior felony convictions improperly proven through probation officer testimony when defendant did not argue state “would have been unable to produce the necessary documentary evidence if he had timely objected”).

¶27 Smith testified he is a “community supervision officer” with the ADOC “parole department” and that he has supervised Hales since July 2009. Furthermore, at the change-of-plea hearing on the prohibited possessor charge, the state presented

evidence of a certified ADOC record showing the relevant convictions and that Hales had been released on community supervision on July 10, 2009. Notably, Hales does not rebut the argument that the state could have proven he was on community supervision.

¶28 Accordingly, Hales has not shown that if he had objected to the error, the state would have been unable to prove he was released on community supervision under § 13-708, and thus, he has not shown the requisite prejudice to be entitled to relief under the fundamental error standard of review.

### **Disposition**

¶29 For the foregoing reasons, Hales's convictions and sentences are affirmed.

/s/ *Peter J. Eckerstrom*

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ *Joseph W. Howard*

JOSEPH W. HOWARD, Chief Judge

/s/ *J. William Brammer, Jr.*

J. WILLIAM BRAMMER, JR., Judge